IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Forfeiture of $45,513 in United States Currency Under the Uniform Controlled Substances Act, RCW 69.50.505, LARRY HOWARD, Appellant v. KING COUNTY SHERIFF, Respondent.	)	No. 63096-2-I DIVISION ONE UNPUBLISHED OPINION FILED: April 12, 2010

Appelwick, J. — Howard appeals the civil forfeiture of $45,513 under the Uniform Controlled Substances Act, chapter 69.50 RCW, ordered by the King County Sheriff's Office hearing examiner. Howard asserts various errors made by the hearing examiner, including failure to dismiss on timeliness grounds, failure to include certain evidence in the record, failure to find justification for the stop and extension of the stop, failure to exclude certain evidence, failure to perform a proportionality analysis under the Eighth Amendment, failure to require that the currency forfeited be traced to a specific drug transaction, and lack of substantial evidence for the forfeiture finding. We affirm.

FACTS

On May 25, 2007, King County Sheriff's Deputy Kevin Savage observed Larry Howard driving while passing him in SeaTac, Washington. Howard looked

surprised and nervous to see the deputy. The deputy observed Howard turn immediately into a Shell gas station, initiating his signal just before the turn. The deputy believed this to be a violation of RCW 46.61.305 (requiring initiation of a turn signal 100 feet before turning). While maintaining visual contact, the deputy ran Howard's license plate number, discovering an outstanding warrant. The deputy approached Howard, who had gotten out of his vehicle at the Shell station, and asked his name. The deputy notified Howard about the traffic infraction and the warrant hit. He noticed that Howard had his identification in one hand and something white in the other. Howard refused to turn over his identification. Despite the deputy's instructions to the contrary, Howard reached into his vehicle. In response, the deputy "stood him up" against the vehicle and saw a golf ball sized rock of what he suspected to be cocaine in Howard's hand.

Howard resisted and reached for the deputy's weapons. He also attempted to break up and discard the suspected cocaine by throwing it in bushes and into a storm drain. After subduing Howard, the deputy searched Howard incident to arrest and found $45,221 in cash distributed around Howard's person. Some of the currency was in $5,000 bundles, packaged for so long that the currency had molded together. The deputy also located two cell phones on Howard.

Officers performed an extensive search of the vehicle, finding items which indicated that Howard may have been living in the car. Officers also found additional suspected cocaine, cash, and a knife in Howard's passenger

compartment. Officers located a pistol in the trunk. The officers discovered no drug paraphernalia on Howard or in the car. The deputy field tested the white substance and it tested positive for cocaine. A drug dog identified the bag containing the money taken from Howard for narcotics.

The King County Sheriff's Office (KCSO) seized the $45,513 and scheduled it for forfeiture under RCW 69.50.505. Howard made a claim of ownership on July 6, 2007. The KCSO sent the notice of hearing on September 7, 2007. The hearing occurred on September 21, 2007, which was 77 days after Howard made his claim.

At the administrative hearing, the deputy was the only witness for KCSO. Howard appeared only through his attorney. Howard provided no evidence or oral argument. Howard marked an aerial image of the area of the arrest as an exhibit but never offered it into evidence. He presented a legal brief, which was untimely under the notice of hearing.[1] After objection from the KCSO and discussion with the hearing examiner, Howard agreed to present the brief as his motion for reconsideration. The hearing examiner orally concluded that the money was forfeited to the KCSO, and entered written findings of fact, conclusions of law, and order of forfeiture, consistent with the oral decision. Howard appealed to the King County Superior Court, which affirmed the

[1] The notice of hearing included deadlines established by the prosecutor, which required certain things to occur prehearing. Procedural rules under which the hearing proceeded were not made part of the record nor did the notice of hearing refer to the procedural rules the KCSO operated under. Howard has not challenged the authority under which the notice was entered nor the requirements of the notice. Because Howard has not challenged the notice nor its issuance, we assume the notice is valid.

administrative order. Howard timely appealed here.

DISCUSSION

I. Standard of Review

We apply the standards of the Washington Administrative Procedure Act (APA), chapter 34.05 RCW, directly to the agency record in reviewing agency adjudicative proceedings[2]. William Dickson Co. v. Puget Sound Air Pollution Control Agency, 81 Wn. App. 403, 407, 914 P.2d 750 (1996). Howard has not assigned error to any findings of fact, so they are verities on appeal. Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 407, 858 P.2d 494 (1993). We review only whether the findings support the conclusions of law. Fuller v. Dep't of Employment Sec., 52 Wn. App. 603, 605, 762 P.2d 367 (1988). On questions of law, our review is de novo. Escamilla v. Tri-City Metro Drug Task Force, 100 Wn. App. 742, 747, 999 P.2d 625 (2000), abrogated on other grounds by In re Forfeiture of One 1970 Chevrolet Chevelle, 166 Wn.2d 834, 840 n.1, 215 P.3d 166 (2009)). Where construction of a statute is required, that is a question of law reviewed de novo. City of Pasco v. Pub. Employment Relations Comm'n, 119 Wn.2d 504, 507, 833 P.2d 381 (1992).

II. Timely Hearing

The first issue is whether the hearing was timely. Howard asserts that a full adversarial hearing on the forfeiture of personal property must be held within

[2] Howard appealed to this court for review of the superior court orders. However, review is properly of the hearing examiner's order of forfeiture and order denying claimant's motion for reconsideration.

45 days. Citing Tellevik v. 31641 West Rutherford Street, 120 Wn.2d 68, 838 P.2d 111, 845 P.2d 1325 (1992) (Tellevik I), and Tellevik v. 31641 West Rutherford Street, 125 Wn.2d 364, 884 P.2d 1319 (1994) (Tellevik II), he argues that, because the seizing agency may transfer or convey seized property within 90 days for real property and 45 days for personal property, a hearing must occur within those respective time periods.[3]

As a threshold issue, Howard assigns error to the hearing examiner's failure to provide a written ruling regarding the timeliness issue. Howard cites no law requiring written rulings rather than merely a record of the ruling, whether oral or written.[4] The record below demonstrates that the hearing examiner orally ruled that the hearing was timely, because the KCSO gave Howard notice of the hearing within 90 days. The hearing examiner did not err by not providing a written ruling regarding the timeliness issue.

Hearings on the seizure of personal property under RCW 69.50.505 are heard under the APA, chapter 34.50 RCW. See RCW 69.50.505(5). The APA requires that the agency commence a hearing within 90 days. RCW 34.05.419(1)(b). Commencement occurs when the agency notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted. RCW 34.05.413(5). Tellevik I and Tellevik II do not require a different result. In re Forfeiture of One 1988 Black Chevrolet Corvette Auto., 91

[3] Howard filed his claim within 45 days of the seizure by the KCSO.
[4] Howard provides citation only to the irrelevant provisions of RCW 34.05.562(2)(a) and .562(2)(c), which allow remand for failure to complete the record.

Wn. App. 320, 323–324, 963 P.2d 187 (1997); Espinoza v. City of Everett, 87 Wn. App. 857, 869, 943 P.2d 387 (1997).

Here, Howard was arrested on May 25, 2007. He made his claim on July 6, 2007. The KCSO sent the notice of hearing on September 7, 2007. The hearing examiner held the hearing on September 21, 2007. Both the notice and the actual hearing occurred within 90 days of Howard's claim. The hearing examiner did not err in concluding the hearing notice was timely.

III. Justification for the Stop

As a threshold issue, Howard challenges the completeness of the record. He assigns error to the hearing examiner's failure to place exhibit 1, a series of aerial photographs of the location of the stop and arrest, into the administrative record. Howard seeks on appeal to use the exhibit to undermine the justification for the traffic infraction and therefore the stop. Although it was marked and used, Howard did not attempt to have the exhibit admitted at the hearing, and he did not raise the issue in his motion for reconsideration. The evidence was not received by the hearing examiner. The hearing examiner properly completed the administrative record without inclusion of proposed exhibit 1.

Howard argues that the deputy did not have probable cause for the stop, because he could not have viewed the traffic infraction (failure to initiate a turn signal 100 feet before the turn) from his alleged vantage point. Howard challenges prearrest actions occurring after the stop, as well as probable cause for the seizure of the currency. Howard did not raise these issues below. RCW

34.05.554 provides that, generally, new issues may not be raised for the first time on appeal. See King County v. Wash. State Boundary Review Bd. for King County, 122 Wn.2d 648, 668–69, 860 P.2d 1024 (1993). Arguments not raised below also will not be considered on appeal unless they concern a manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Sengxay, 80 Wn. App. 11, 15, 906 P.2d 368 (1995). Error is manifest if it results in actual prejudice to the defendant. State v. WWJ Corp., 138 Wn.2d 595, 602–03, 980 P.2d 1257 (1999). If the record is insufficient to determine the merits of the constitutional claim, the claimed error is not manifest and review is not warranted. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Questions of fact about this issue were not resolved below. Although Howard questioned Deputy Savage about the factual circumstances of the infraction, he did not challenge the deputy's testimony. Howard did not question the deputy regarding his ability to see the infraction, and did not present evidence to counter the deputy's testimony. Failure to challenge the testimony discouraged the KCSO from providing more evidence, necessary for the agency to make a full determination of the issues. Howard concedes that his ability to make the argument to this court is limited. Because the record from the hearing is insufficient to determine the merits of the constitutional claim, the claimed error is not manifest, and review is not warranted. Id.

In his reply brief, Howard challenges for the first time the existence of probable cause to order Howard to take certain actions between the stop and his

arrest and to seize the currency. We need not address an issue first raised in a reply brief. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).[5]

The challenges to probable cause are not properly before this court.

IV. Evidentiary Rulings

Howard assigns error to the hearing examiner's admission of the pistol, the K-9 evidence, and the knife with a curved blade.

Evidence, including hearsay evidence, is admissible if, in the judgment of the presiding officer, it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. RCW 34.05.452(1); See also RCW 34.05.461(4) ("Findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible in a civil trial."). Evidentiary decisions are reviewed for an abuse of discretion. Univ. of Wash. Med. Ctr. v. State Dep't of Health, 164 Wn.2d 95, 104, 187 P.3d 243 (2008).

A. Pistol

The police located an unloaded Derringer pistol in Howard's trunk during a warrantless search. Howard did not challenge the admissibility of the pistol in a prehearing motion to suppress, as required in the KCSO notice of hearing, or by objection at the hearing. Howard did not question the witness as to consent

[5] Rule 2.5(a)(3) does not require review if a constitutional argument is raised for the first time in reply. Oostra v. Holstine, 86 Wn. App. 536, 543, 937 P.2d 195 (1997).

to search the trunk. Howard raised the question of the admissibility of the pistol in one sentence in the motion for reconsideration. For an issue to be raised before the agency there must be more than a hint or slight reference to the issue in the administrative record. State Boundary Review Bd., 122 Wn.2d at 670. The issue regarding the improper search of the pistol was not properly preserved for review.

Additionally, the hearing examiner did not rely on the pistol in his decision. The outcome would not have differed had the hearing examiner not allowed testimony on the pistol therefore any error would be harmless. RCW 34.05.570(1)(d) ("The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of."); see also State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). The hearing examiner's decision to admit the testimony on the pistol, even if it was an abuse of discretion, would constitute harmless error.

B. K-9 Evidence

The arresting officers called a K-9 unit to the scene of the arrest. The drug dog alerted on a paper bag containing the currency at issue, indicating that the bag contained narcotics. Howard argues that the K-9 evidence should have been excluded, because it lacked foundation on three grounds: the deputy improperly handled the cocaine, contaminating the currency; the dog was not reliable; and traces of controlled substances are commonly found on currency. Howard additionally argues that the deputy improperly testified as an expert.

Howard failed to object to the admission of the K-9 alert in a prehearing motion to suppress or in a motion in limine, as required in the KCSO notice of hearing. Howard did object at the hearing:

> [Deputy Prosecuting Attorney Alice Degen]: Now, at some point – I'm gonna go back to the events of this evening. At some point during the evening, was a K9 officer called out?
>
> . . . .
>
> [Howard's Counsel]: I'm gonna object, there's no foundational basis for the entry of non lay testimony here. What I think that – what I think is happening is that, in essence, she's asking Deputy Savage to lay testimony for the K9 officer before the introduction of the K9's alert. I understand the hearing officer may want to take the testimony, and I would ask before final adjudication is made that you'll allow me to brief the foundational prerequisites that are normally required before introduction of K9 evidence?
>
> [Hearing examiner]: Okay, I'll listen to that.
>
> [Questioning regarding K-9 evidence continues].

The hearing examiner deferred ruling on the objection. Howard failed to submit the proposed brief regarding the foundational requirements of the K-9 testimony. Howard did not raise the issue again therefore he abandoned the objection by not obtaining a final ruling. See State v. Riker, 123 Wn.2d 351, 369, 869 P.2d 43 (1994) (holding that a defendant who does not seek a final ruling on a motion in limine after a court issues a tentative ruling waives any objection). Because it was not properly preserved below, Howard may not raise this issue on appeal. RCW 34.05.554(1). The hearing examiner did not abuse its discretion in admitting the testimony regarding the K-9 alert.

C. Knife

Officers located a 10 inch knife with a curved blade and wooden handle in Howard's vehicle. Howard argues that evidence of the knife should have been excluded on relevance grounds. The hearing examiner found the evidence relevant to show the extent to which Howard went to resist arrest, as Howard had apparently been reaching for the knife as a tool to prevent discovery of the currency and cocaine. The hearing examiner found this relevant to show that Howard knew the drugs and currency were in his car and on his person. This is the type of evidence upon which a reasonable person would rely. RCW 34.05.452. The hearing examiner did not abuse his discretion in admitting testimony regarding the knife.

Even if the hearing examiner erred in admitting testimony regarding the K-9 evidence and the knife, the errors would be harmless. Halstien, 122 Wn.2d at 127. The quantity of the currency and drugs, as well as Howard's behavior at arrest, including hiding his identification, violently fighting the officer, and breaking up the large amount of cocaine and disposing of it, provide substantial evidence for these findings. These findings support the ultimate conclusion that Howard was involved in drug trafficking. Howard would not be prejudiced even if the hearing officer erred in admitting the disputed evidence. Any error was harmless.

V. Eighth Amendment

Howard assigns error to the hearing examiner's failure to perform an

Eighth Amendment excessive fine analysis.[6] He raised this argument only in his motion for reconsideration. Therefore, this court will review the hearing examiner's denial of the motion for reconsideration for abuse of discretion. Chen v. State, 86 Wn. App. 183, 192, 937 P.2d 612 (1997). New issues raised in a motion for reconsideration may at times be raised where the issue does not depend on new facts. See August v. U.S. Bancorp, 146 Wn. App. 328, 347, 190 P.3d 86 (2008), review denied, 165 Wn.2d 1034, 203 P.3d 380 (2009).

Here, the excessive fine analysis would require evaluation of facts not established at the hearing, including, for example, the duration and extent of the criminal activity and the effect of the criminal activity on the community. 6717 100th Street, 83 Wn. App. at 371–76. Because analysis of the issue depended on new facts, Howard's request for an excessive fine analysis was not timely. The hearing examiner did not abuse his discretion in denying the motion for

[6] The Eighth Amendment of the United States Constitution states, in pertinent part, that, "Excessive fines [shall not be] imposed, nor cruel and unusual punishments inflicted." It restricts punishment, which can include civil in rem forfeitures. Tellevik v. 6717 100th St. S.W., 83 Wn. App. 366, 372, 921 P.2d 1088 (1996). When deciding how the Eight Amendment affects a particular civil in rem forfeiture, it is necessary to address two questions: (1) does the forfeiture constitute punishment, and (2) if so, is that punishment excessive? Id. (citing Austin v. United States, 509 U.S. 602, 619–22, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993)). Forfeiture may be constitutionally precluded if the value of the forfeited property is grossly disproportionate to the criminal activity forming the basis of the forfeiture. United States v. Bajakajian, 524 U.S. 321, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). To perform an excessive fines analysis, Washington courts must examine two factors to determine whether a specific forfeiture is so excessive as to violate the Constitution: (1) instrumentality, or the relationship of the property to the offense; and (2) proportionality, or the extent of the criminal activity compared to the severity of the effects of the forfeiture on the claimant. 6717 100th Street, 83 Wn. App. at 371–76. Instrumentality factors include the role the property played in the crime, the role and culpability of the property owner, whether the use of the property was planned or fortuitous, and whether the offending property can be readily separated from innocent property. Id. at 374. Proportionality factors include the nature and value of the property; the effect of the forfeiture on the owner and gravity of the type of crime; the duration and extent of the criminal activity; and the effect of the criminal activity on the community, including the costs of prosecution. Id. at 374–75.

reconsideration on this issue.[7]

Howard's untimely request for an excessive fines analysis is not reviewable by this court.

VI. Tracing and Substantial Evidence

Howard next argues that the KCSO must prove a known link to a drug transaction to make the currency subject to forfeiture. Howard raises this argument only in his motion for reconsideration, the denial of which is reviewed for abuse of discretion. Chen, 86 Wn. App. at 192. Howard also challenges whether substantial evidence supported forfeiture. If he is correct, this court must reverse. RCW 34.05.570(3)(e).

The statute authorizes the seizure and forfeiture of three different types of personal property.[8] RCW 69.50.505(1)(g). The first clause covers personal property furnished or intended to be furnished in exchange for a controlled substance. Id. The second clause relates to personal property, proceeds, or assets acquired with proceeds traceable to an exchange or series of exchanges of controlled substances. Id. The third clause covers forfeitures of personal

[7] Although RAP 2.5(a)(3) allows review of new arguments if there is manifest error affecting a constitutional right, here, the record is insufficient to evaluate Howard's excessive fines claim on appeal. See WWJ Corp, 138 Wn.2d at 603 (declining to consider excessive fines clause claim because the record was insufficiently developed for evaluation of the claim).

[8] RCW 69.50.505(1) makes subject to forfeiture "(g) All moneys, negotiable instruments, securities, or other tangible or intangible property of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this chapter or chapter 69.41 or 69.52 RCW, all tangible or intangible personal property, proceeds, or assets acquired in whole or in part with proceeds traceable to an exchange or series of exchanges in violation of this chapter or chapter 69.41 or 69.52 RCW, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this chapter or chapter 69.41 or 69.52 RCW."

property used to facilitate the illegal transaction. Id.

Here, the KCSO alleged that Howard violated the first clause of RCW 69.50.505(1)(g), currency furnished or intended to be furnished in exchange for a controlled substance.[9] This clause does not require that the currency be traceable to an exchange of controlled substances, as does the second clause. Id.; see, e.g., Sam v. Okanogan County Sheriff's Office, 136 Wn. App. 220, 229–30, 148 P.3d 1086 (2006) (upholding forfeiture without tracing to an exchange of illegal substance, where a large amount of cash, bundled in small amounts, was found in the remains of an airplane that crashed while bound for Canada).

Howard argues failure to imply a tracing requirement would require the court to uphold every forfeiture where a claimant possesses both money and drugs. Not so. See Valerio v. Lacey Police Dep't, 110 Wn. App. 163, 179, 39 P.3d 332 (2002) (holding currency was not subject to forfeiture where there was no clear evidence that the claimant was, or was about to become, involved in illegal drug sales). Here, evidence beyond the mere possession of both drugs and money provides support for the hearing examiner's conclusion.

[9] The cases cited by Howard, Tri-City Metro Drug Task Force v. Contreras, 129 Wn. App. 648, 119 P.3d 862 (2005), and King County Department of Public Safety v 13627 Occidental Avenue South, 89 Wn. App. 554, 950 P.2d 7 (1998), are distinguishable because they involve the second type of property, proceeds traceable to an exchange in violation of RCW 69.41. See Contreras, 129 Wn. App. at 653 (finding that there must be evidence of tracing the proceeds to an illegal drug transaction in order to forfeit personal property such as consumer electronics as proceeds under former RCW 69.50.505(a)(7) (1993)); 13627 Occidental, 89 Wn. App. at 556, 558 (finding that the claimant's real property could not be subject to forfeiture under the second clause of former RCW 69.50.505(a)(7), because there was no finding that parties acquired the real property with proceeds traceable to the claimant's illegal activity).

The hearing examiner concluded that the money was furnished or intended to be furnished in exchange for a controlled substance in violation of RCW 69.50.505(1)(g) based on the following findings of fact: First, Howard had on his person over $45,000 in cash. The pure amount of cash is indicative that it was intended to be furnished for drugs. See Sam, 136 Wn. App. at 229. Additionally, the attributes of the currency, specifically the distribution of the cash in different pockets, the method of bundling, the condition of the bundles, and the fact that the bundles contained old money indicated drug sales. Also, the lack of drug paraphernalia indicated that the seized controlled substances were not for personal use, but rather for drug trafficking. Finally, Howard had on his person and in the car amounts of cocaine in quantities indicating drug trafficking. These unchallenged findings of fact are verities on appeal.[10] Tapper, 122 Wn.2d at 407.

Substantial evidence supports the hearing examiner's conclusion that the money should be forfeited under the first clause of RCW 69.50.505(1)(g). Under the facts of this case the statute did not require that the forfeited property be traceable to a drug transaction. Therefore, the hearing examiner did not abuse his discretion in denying the motion for reconsideration on this issue. The hearing examiner did not err in ordering the forfeiture under RCW

[10] Howard argues that the deputy's testimony is of low probative value. He also argues that the hearing examiner erred in not making a credibility determination as to the value of the deputy's testimony. RCW 34.05.461(3) requires that, "Any findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified." Here, where Howard did not present contradictory evidence or otherwise challenge the deputy's credibility, the hearing examiner did not need to weigh credibility and did not need to include a credibility finding in his order.

69.50.505(1)(g).

We affirm.

WE CONCUR: